

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;  
Robert G. Taub, Vice Chairman;  
Mark Acton;  
Tony Hammond; and  
Nanci E. Langley

Complaint of GameFly, Inc.

Docket No. C2009-1R

ORDER ON REMAND



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(Issued June 26, 2013)

This case has been remanded by the United States Court of Appeals for the District of Columbia Circuit for further proceedings to consider an appropriate remedy for the undue discrimination previously found by the Commission to exist in Docket No. C2009-1.<sup>1</sup> *GameFly, Inc. v. Postal Regulatory Commission*, 704 F.3d 145 (D.C. Cir. 2013) (*GameFly*). For the reasons discussed below, the Commission directs the Postal Service to equalize the rates for letter-shaped and flat-shaped round-trip DVD mailers either by establishing new equalized rates for such letter-shaped and flat-shaped round-trip DVD mailers, or by reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer.

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<sup>1</sup> Order on Complaint, April 20, 2011 (Order No. 718).

This Order is comprised of four sections. Section I describes the background to the current remand proceedings. Section II summarizes the Commission proceedings since the issuance of the Court's mandate and includes a summary of the potential remedies identified by GameFly, the Postal Service, and the Commission. Section III begins with a summary of the Commission's responsibilities that guide its selection of an appropriate remedy, and then presents the Commission's evaluation of each of the potential operational and rate-based remedies. On the basis of this analysis, the Commission concludes that an equalized rate remedy is most appropriate. Section IV discusses what the equalized rate should be and how it will be determined. Attached to this Order is an appendix containing Mail Classification Schedule language designed to implement the Commission's decision.

## I. BACKGROUND

### A. Order No. 718

Proceedings in this docket were instituted by GameFly's filing of a complaint under 39 U.S.C. § 3662.<sup>2</sup> In that Complaint, GameFly alleged that rates and services offered by the Postal Service to it and certain DVD mailers violated prohibitions on undue or unreasonable discrimination under 39 U.S.C. §§ 101(d), 403(c), 404(b), and 3622(b)(8).

Although it found that the Postal Service had unduly discriminated against GameFly, the Commission rejected GameFly's proposed operational and rate remedies. *Id.* 110-13.<sup>3</sup> Instead, the Commission established a "niche classification" for round-trip DVD mail in the Mail Classification Schedule (MCS). *Id.* at 113-115. The niche classification included a "Letter Round-Trip Mailer" rate category and a "Flat Round-Trip Mailer" rate category.<sup>4</sup> Order No. 718 at 110-13; and Appendix B. The Commission characterized this remedy as providing GameFly with treatment comparable to the treatment the Postal Service gave Netflix. *Id.* at 114. Retention of the letter/flats distinction did, however, result in a higher rate and a higher per-piece contribution for round-trip DVD mail sent as flats instead of letters. *Id.* at 115. The Commission found the higher rates and contribution to be justified by "cost differences and by general pricing differences between First-Class Mail flat and letter products." *Id.*

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<sup>2</sup> Docket No. C2009-1, Complaint of GameFly, Inc., April 23, 2009, at 1 (Complaint).

<sup>3</sup> Order on Complaint, April 20, 2011, at 108 (Order No. 718).

<sup>4</sup> The Letter Round-Trip Mailer category allowed round-trip DVD mailers to send one-ounce letter-shaped mail at the single-piece machinable letter rate and prevented the Postal Service from applying a non-machinable surcharge to such mail. *Id.* at 1. The Flat Round-Trip Mailer category allowed round-trip DVD mailers to send flat-shaped mail of up to two ounces at the one-ounce single-piece First-Class flats rate. *Id.* at 2.

B. The *GameFly* Decision

GameFly filed an appeal of the remedy under 39 U.S.C. § 3663. The Postal Service elected not to appeal the Commission's finding of undue discrimination, but did participate in the appellate proceedings in support of the remedy prescribed by Order No. 718.

The Court rejected the Commission's remedy because it left in place part of the discrimination it was attempting to remedy without adequately explaining why the "residual discrimination" was due or reasonable. 704 F.3d at 149. The residual discrimination identified by the Court consisted of continuing differences in the terms of service offered to DVD mailers of letter-shaped and flat-shaped mail. The Court explained that the Commission "cannot justify the terms of service discrimination its remedy leaves in place (providing manual letter processing to Netflix but not to GameFly) based on the companies' use of different mailers when the use of different mailers is itself the product of the service discrimination." *Id.*

The Court vacated the Commission's order and remanded the case to the Commission to "either remedy all discrimination or explain why any residual discrimination is due or reasonable under § 403." *Id.* It expressed the opinion that the Commission would "surely consider" GameFly's proposed remedies on remand, but noted that "there may be a range of other possible remedies which would withstand appellate review." *Id.*

## II. PROCEEDINGS ON REMAND

### A. Initial GameFly and Postal Service Filings

The parties responded to the GameFly opinion by filing a series of pleadings and documents setting out their respective positions and expectations for proceedings on remand. The first of these was a motion filed by GameFly on March 7, 2013, the same day the Court issued its mandate.<sup>5</sup> This motion was followed by a Postal Service reply,<sup>6</sup> and a GameFly response.<sup>7</sup>

*March 7 GameFly Motion.* GameFly takes the position that, together, Order No. 718 and the Court's opinion have resolved the key issues in this matter and that the scope of the remanded proceeding is therefore relatively narrow. March 7 GameFly Motion at 1-8. A central element of GameFly's position is its view that the Court's opinion prohibits continued price discrimination on the basis of differences in the choice of mailer shape that are themselves the result of continued service, or operational, discrimination. *Id.* at 7-8.

Relying heavily upon its interpretation of the Court's opinion, GameFly argues that the Commission should order the Postal Service summarily to equalize the rates for letter-shaped and flat-shaped round-trip DVD mailers. *Id.* at 8. In the absence of a Postal Service proposal that would equalize those rates, GameFly asserts that the Commission should order the Postal Service to reduce the price for a two-ounce First-

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<sup>5</sup> Motion of GameFly, Inc. to Establish Standards and Procedures to Govern Proceedings on Remand, March 7, 2013 (March 7 GameFly Motion).

<sup>6</sup> United States Postal Service Reply in Opposition to Motion of GameFly, Inc., to Establish Standards and Procedures to Govern Proceedings on Remand, March 14, 2013 (March 14 Postal Service Reply).

<sup>7</sup> Response of GameFly, Inc. to March 14 USPS Opposition to GameFly Motion to Establish Standards and Procedures to Govern Proceedings on Remand, March 18, 2013 (March 18 GameFly Response). The March 18 GameFly Response was accompanied by a motion for leave to respond. Motion of GameFly, Inc., for Leave to Respond to March 14 USPS Opposition to March 7 GameFly Motion, March 18, 2013. The motion is granted.

Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer. *Id.* at 9-13. GameFly refers to this latter alternative as a “default remedy” and argues that the Court’s opinion has left no material issues of fact that require reopening of the evidentiary record. *Id.* at 13. Given the absence of any need to reopen the record and in view of its continuing injury, GameFly urges the Commission to impose the default remedy 30 days after issuance of the Commission’s order on remand. *Id.* at 9, 13.

While it seeks prompt imposition of a more complete remedy by means of its proposed default remedy, GameFly acknowledges that the Postal Service may wish to propose either a different equalized rate remedy or an operational remedy that eliminates undue discrimination in the processing of DVD mailers. *Id.* at 14-18. GameFly submits that any such proposal should be made within 30 days of the Commission’s order on remand and that certain information should be required to support such proposals. *Id.* Because it considers the existing record to impose “a heavy presumption against any operational remedy,” GameFly asserts that the Postal Service should be required to submit extensive support for any proposed operational remedy. *Id.* 15-18. Finally, GameFly states that if the Postal Service proposes either a rate or an operational remedy, it should be given 30 days or 60 days, respectively, to analyze and comment on such a proposal. *Id.* at 14-15.

*March 14 Postal Service Reply.* The Postal Service characterizes GameFly’s position as an attempt to “eliminate the Commission’s discretion and remedial authority” and to prevent the Commission “from opening the record or otherwise collecting input of guidance regarding the steps necessary to make an informed decision on remand.” March 14 Postal Service Reply at 2.

In the Postal Service’s view, a new remedy cannot be established without reopening the record. *Id.* at 5-10. In addition, it asserts that in order to avoid reversal on appeal, collateral attacks, or negative implications for other products or operational

policies, a new remedy must be consistent with applicable laws and regulations governing the establishment of postal rates and classifications, as well as Postal Service authority to direct postal operations. *Id.* at 6-7. A new remedy must also have evidentiary support not provided by the current record. *Id.* at 7-8. The Postal Service bases its position, in part, on an interpretation of the Court's opinion that is significantly different from the interpretation advocated by GameFly. *Id.* 8-10.

Rather than adopt a new remedy, the Postal Service urges the Commission to evaluate evidence in the existing record in order to formulate a legally sufficient justification for the original remedy adopted in Order No. 718. *Id.* at 10-14.

Finally, the Postal Service argues that the information that GameFly asserts should accompany any rate or operational remedy proposed by the Postal Service constitutes a restriction that would unnecessarily limit the Commission's remedial authority. *Id.* at 14-15.

*March 18 GameFly Response.* In its March 18 response, GameFly argues that the Postal Service should not be permitted to relitigate factual issues resolved by Order No. 718 or the findings of *GameFly*. March 18 GameFly Response at 4-6. Although it concedes there may be alternative remedies available that would require the Commission to reopen the record, GameFly asserts that the degree to which the record should be reopened will depend on the particular alternative remedy proposed. *Id.* at 8. GameFly further asserts that its suggestion that the Commission require particular information be filed together with a proposed alternative remedy is, in fact, a request that the Commission impose a filing requirement, not an attempt to limit the Commission's authority. *Id.* at 10. Finally, GameFly argues that a remedy that equalizes rates for letter- and flat-shaped DVD mailers is neither discriminatory against other flat-shaped mail, nor likely to have a significant impact on the Postal Service's financial situation. *Id.* at 11-12.



B. Order No. 1700 and Settlement Conference

Following receipt of the parties' initial pleadings, the Commission on April 16, 2013, scheduled a settlement conference for April 23, 2013, designated a Settlement Coordinator, and encouraged the parties to resolve all outstanding issues expeditiously.<sup>8</sup> In its order, the Commission identified three remedies proposed by the parties, as well as three additional potential remedies. Order No. 1700 at 9; Appendix.

On May 6, 2013, the Settlement Coordinator reported that the parties were unable to reach an agreement on either an operational remedy or a rate-based remedy and that they were unlikely to do so within a predictable time frame.<sup>9</sup>

C. Post-Settlement Conference Filings

*May 6 Postal Service Notice.* On the same day the Settlement Coordinator filed his report, May 6, 2013, the Postal Service filed a notice of a letter it had previously sent to GameFly on May 3, 2013.<sup>10</sup> In that Letter, the Postal Service has stated its willingness to process GameFly's letter-shaped DVD mail "using methods that avoid letter machine processing to substantially the same degree experienced by DVD mail submitted by other mailers who present mail with similar packaging that qualifies for the letter rate."<sup>11</sup> Letter at 1. Notwithstanding its willingness to process GameFly DVD letter mail in the manner indicated, the Postal Service expressly stated that this processing method would not be accompanied by an enforcement mechanism. May 6 Postal Service Notice at 2.

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<sup>8</sup> Order Convening Settlement Conference, April 16, 2013 (Order No. 1700).

<sup>9</sup> Report of Settlement Coordinator, May 6, 2013.

<sup>10</sup> United States Postal Service Notice of Filing, May 6, 2013 (May 6 Postal Service Notice). A copy of the Postal Service's May 3 letter (Letter) was attached to the filing.

<sup>11</sup> The Postal Service was careful to note that its letter did not constitute a settlement offer, but it did characterize the proposed processing method as similar to one of the remedies described in Order No. 1700. *Id.* at 1.

*May 13 GameFly Response.* GameFly responded to the May 6 Postal Service Notice and to the Settlement Coordinator's report by rejecting all of the remedies identified in Order No. 1700 except for its equal rate remedy and by again exhorting the Commission to impose that remedy.<sup>12</sup>

GameFly states that the parties are "no closer to agreement on a remedy than they were two, four or six years ago" and argues that by delaying final resolution of the remand proceedings, further attempts to encourage settlement will impose great financial harm on GameFly. May 13 GameFly Response at 3-4. GameFly analyzes, and rejects, the remedies described in Order No. 1700.

GameFly contends that the operational remedies identified in Order No. 1700 would be unlawful because they do not ensure parity in the processing of DVD mail. *Id.* at 8-15. It identifies enforcement as the "Achilles heel of all of these operational remedies," claiming that an operational directive without a mechanism for enforcement is illusory. *Id.* at 10. GameFly also summarily dismisses the Postal Service's proposed remedy of reaffirming the rate-based remedy adopted by Order No. 718. *Id.* at 15-16.

*May 17 Postal Service Reply.* On May 17, 2013, the Postal Service moved for leave to reply to the May 13 GameFly Response.<sup>13</sup> The May 17 Postal Service Reply expresses concern that GameFly's proposed rate-based remedy would allow future complainants to demand preferential treatment as a reward for a successful discrimination complaint. *Id.* at 2.

The Postal Service again asserts that a rate-based remedy would require reopening the record. *Id.* at 4. It argues that the existing record does not contain the

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<sup>12</sup> Response of GameFly, Inc., to Commission Order No. 1700, Report of Settlement Coordinator, and USPS Letter and Notice of Filing, May 13, 2013 (May 13 GameFly Response).

<sup>13</sup> United States Postal Service Motion to File Reply to GameFly's "Response," May 17, 2013. Accompanying this motion was the United States Postal Service Reply to Response of GameFly, Inc., to Commission Order No. 1700, Report of Settlement Coordinator, and USPS Letter and Notice of Filing, May 17, 2013 (May 17 Postal Service Reply). The motion for leave to reply is granted.

information necessary for the Commission to fairly impose a rate-based remedy, especially cost information. *Id.* at 4-6. It contends that failure to reopen the record would result in discrimination against other mailers “that cannot be justified in light of current operations, changed circumstances, and the application of sound policies.” *Id.* at 7.

Finally, the Postal Service argues that if the Commission does not reaffirm its original remedy, the Postal Service’s May 3 letter provides the most appropriate framework for an alternative remedy that complies with *GameFly*. *Id.* at 8. Specifically, it argues that current operational conditions would allow the Commission to impose an operational remedy. *Id.* at 10.

*May 20 GameFly Response.* On May 20, 2013, GameFly filed a response in which it stated that it would not oppose the Postal Service’s filing of the May 17 reply, but urged the Commission promptly to take action on remand.<sup>14</sup>

#### D. Summary of Potential Remedies

During the course of this proceeding, the parties have proposed a range of potential remedies, which can be divided into two general categories: operational remedies and rate-based remedies.<sup>15</sup> An operational remedy is a remedy that is primarily concerned with changing the manner in which the Postal Service processes round-trip DVD mail. A rate-based remedy focuses on the rates the Postal Service charges for round-trip DVD mail. Some remedies discussed in this Order combine both

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<sup>14</sup> Response of GameFly, Inc., to May 17 Motion of United States Postal Service for Leave to File Reply, May 20, 2013.

<sup>15</sup> As a preliminary matter, Order No. 1700 identified six potential remedies. This Order considers those six remedies together with a potential operational remedy suggested by the Postal Service after the issuance of Order No. 1700, the original operational remedy proposed by GameFly prior to the issuance of Order No. 718, and an additional operational remedy identified by GameFly on remand that was not discussed in Order No. 1700. Accordingly, this Order discusses all nine potential remedies identified since the filing of GameFly’s original complaint.

operational and rate-based elements. For convenience, this Order will consider any remedy with an operational aspect to be an operational remedy even if such remedy also has a rate-based element.

## 1. Operational Remedies

On remand, GameFly, the Postal Service, and the Commission have either proposed or identified remedies that would change the way the Postal Service processes letter-shaped DVD mail. The objective of these remedies would be to avoid undue discrimination in the processing of DVD letter mail. Successful implementation of a legally adequate operational remedy would eliminate the need for a rate remedy. The operational remedies proposed, or identified, are:

- (1) *GameFly's First Operational Remedy: This remedy was proposed by GameFly during the administrative proceedings that led to the issuance of Order No. 718. Its adoption would have required the Postal Service to offer "a measurable and enforceable level of manual culling and processing of DVD mailers sent at machinable letter rates." See Order No. 718 at 110-111, ¶ 5012. The Commission rejected this remedy as infeasible. Id. at 111-12, ¶¶ 5014-16. As discussed below, GameFly no longer advocates that the Commission adopt this remedy.*
- (2) *GameFly's Second Operational Remedy: This remedy was first proposed by GameFly on remand as an alternative remedy. It can be viewed as a variant of GameFly's First Operational Remedy. If adopted, the Postal Service would either provide the same level of manual processing to Netflix and GameFly or discontinue manual processing of Netflix mail. March 7 GameFly Motion at 15. As discussed below, GameFly no longer advocates that the Commission adopt this remedy.*
- (3) *Postal Service Operational Remedy: By letter dated May 3, 2013, a copy of which was filed with the Commission as an attachment to its May 6 Postal Service Notice of Filing, the Postal Service identifies as a possible operational remedy its willingness "[t]o the extent possible and practicable, ...to process GameFly letters using methods that avoid letter machine processing to substantially the same degree experienced by DVD mail submitted by other mailers*

*who present mail with similar packaging that qualifies for the letter rate.” May 6 Postal Service Notice at 1.*

- (4) *Commission-Identified Operational Remedy No. 1: This remedy would retain the Letter Round-Trip DVD Mailer and Flat Round-Trip DVD Mailer categories created by Order No. 718, impose a requirement that the Postal Service manually process all letter-shaped DVD mail, and establish an enforcement mechanism to ensure manual processing at a certain level. Order No. 1700, Appendix at 2.*
- (5) *Commission-Identified Operational Remedy No. 2: This remedy would eliminate Letter Round-Trip DVD Mailer and Flat Round-Trip DVD Mailer categories created by Order No. 718 and would require the Postal Service to impose the non-machinable surcharge on letter DVD mail and the second-ounce rate on 2-ounce flats.<sup>16</sup> Id.*
- (6) *Commission-Identified Operational Remedy No. 3: This remedy would eliminate Letter Round-Trip DVD Mailer and Flat Round-Trip DVD Mailer categories created by Order No. 718 and would require manual handling of all letter-shaped DVDs subject to certain standards. Id., Appendix at 3.*

## 2. Rate-Based Remedies

A rate-based remedy would leave Postal Service operational decisions unaffected. GameFly and other mailers could, however, avoid the adverse physical impact (*i.e.*, disc breakage) of any operational discrimination (*i.e.*, a denial of comparable levels of hand processing provided to other mailers) by mailing their DVDs as 2-ounce flats. The adverse rate impact of using 2-ounce flats would be remedied by affording rate relief to such mailers. Together, the ability of mailers to use 2-ounce flats at a Commission-prescribed remedial rate would protect DVD mailers from both the adverse physical and rate impacts that flow from the undue discrimination found to exist

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<sup>16</sup> GameFly questions whether this remedy is properly considered an operational remedy. May 13 GameFly Response at 7. The Commission considers this remedy to be a primarily operational remedy because it would require that no special operational treatment be afforded to any DVD mailer. The elimination of special treatment would require the Postal Service to change its practice of manually culling Netflix’s letter-shaped DVDs.

by Order No. 718. Three possible rate-based remedies were identified in Order No. 1700:

- (1) *GameFly's Equal Contribution Remedy*: This remedy was proposed by GameFly during the administrative proceedings that led to the issuance of Order No. 718. Its adoption would have reduced rates for flat-shaped DVD mail to a level that would produce an equal contribution for letter- and flat-shaped DVD mail.
- (2) *Order No. 718's Rate-Based Remedy*: This remedy was adopted by Order No. 718 and was vacated by the *GameFly* Court, subject to possible reconsideration on remand. It eliminated the second-ounce charge for flat-shaped round-trip DVD mail and precluded collection of the non-machinable surcharge on letter-shaped round-trip DVD mail.
- (3) *GameFly's Equalized Rate Remedy*: This remedy is proposed by GameFly in the remand proceedings. Its adoption would equalize rates for letter- and flat-shaped DVD mail at either the First-Class Mail one-ounce letter rate or at some higher rate.

Order No. 1700 at 9, Appendix at 1.

### III. ANALYSIS

During the course of this proceeding, the parties have presented and the Commission has considered various solutions that would remedy the undue discrimination found by the Commission in Order No. 718. Over this period, nine potential remedies have been identified. All of these remedies are discussed in this Order. While it is at least conceivable that other potential remedies exist, no additional remedies have yet been identified or brought to the Commission's attention.

The Commission has three responsibilities on remand. First, it must impose an effective remedy that eliminates the undue discrimination. Second, it must impose a remedy that is enforceable. Finally, it should impose a remedy that does not cause undue delay. In this section, the Commission first explains the nature and origin of each of its three responsibilities. It then examines each of the proposed operational remedies and concludes that none of the operational remedies would allow the Commission to fulfill all three responsibilities. Finally, it analyzes the proposed rate-based remedies and finds that, of these, only an equalized rate remedy would allow the Commission to fulfill all three responsibilities.

#### A. Commission's Responsibilities

##### 1. Impose an Effective Remedy

The Commission's first responsibility is to impose an effective remedy. The Court's opinion requires the Commission to remedy all residual discrimination or explain why any residual discrimination is due or reasonable. As the Court explained:

The Commission found that GameFly would switch to letter mail if the Postal Service would provide the same service on the same terms it provides to Netflix. The Postal Service refuses to do so. Without special manual processing like that afforded to Netflix, switching to letter mail could subject GameFly to an epidemic of cracked and shattered DVDs. The Commission cannot justify the terms of service discrimination its remedy leaves in place (providing manual processing to Netflix but not to GameFly) based

on the companies' use of different mailers when the use of different mailers is itself the product of the service discrimination.

*GameFly*, 704 F.2d at 149.

The Commission cannot, for example, impose a remedy that denies GameFly a meaningful choice between letters and flats. The Court has ruled that the choice between letters and more expensive flats given to GameFly by the remedy adopted in Order No. 718 was not a meaningful choice because of the inadequately explained residual discrimination left in place. *Id.*

The Postal Service objects to the Commission considering breakage as an indicator of discrimination, asserting that “by focusing on breakage, GameFly’s arguments stray from the issue central to the Commission’s decision in this docket—the elimination of unreasonable discrimination.” May 17 Postal Service Reply at 9. But the Court’s opinion found that the threat of breakage was central to the determination of whether GameFly had a meaningful choice between letter-shaped mail and flat-shaped mail. Although the Postal Service believes that “DVD breakage is a separate issue and is the responsibility of the mailer and not the Postal Service,” the Court found that breakage rates relate directly to the question of whether the Postal Service is extending equal treatment to GameFly, Netflix, and other DVD mailers. To be effective, the remedy adopted by the Commission must ensure GameFly protection from disc breakage, just as the Postal Service’s special processing of Netflix mail protected Netflix from the breakage of its discs. To be effective, such protection cannot subject GameFly to other injury, such as higher rates than Netflix, unless such higher rates can be adequately explained.

## 2. Impose an Enforceable Remedy

The remedy selected by the Commission must not only be effective, but enforceable. A remedy that cannot be enforced is potentially illusory. The requirement that the remedy prescribed in this case be enforceable is particularly important given the



circumstances presented in this case. The record underlying Order No. 718 demonstrated that undue discrimination did not result from coincidental decisions of local Postal Service operators that favored Netflix over GameFly. Had that been the case, the unlawful discrimination might have been cured by ordering the Postal Service to issue a general nationwide directive that all DVD mailers be accorded, as nearly as practicable, the same level of manual processing as Netflix. However, the record demonstrated, and the Commission expressly found, that Postal Service Headquarters was deeply involved in the decision to offer Netflix preferential processing of its DVD letter mail. Order No. 718 at 72-73, ¶¶ 4152-55. In addition, the record lacked any evidence that Postal Service Headquarters attempted to direct local operators to provide comparable processing of DVD letter mail for other mailers. Together, the Postal Service's pattern of intentional preferences favoring Netflix and its consistent refusal to provide GameFly any credible assurances of a comparable level of such preferences require that the remedy adopted in this proceeding be enforceable.

### 3. Prevent Unnecessary Delay

Finally, the remedy should provide GameFly with timely relief. Delay in implementation of the remedy finally selected only adds to the injury already sustained by GameFly. To provide timely relief, the Commission must limit further administrative proceedings to those that are necessary to select an effective and enforceable remedy.

The Postal Service claims that reopening the record is necessary because "the Commission cannot ignore material changes in facts due to changed circumstances." May 17 Postal Service Reply at 4. It asserts, for example, that its "May 3 letter, as well as the changed circumstances and operational realities that underpin it, have altered the factual and legal landscape in which the Commission's action now takes place." *Id.* at 7. It argues that in light of changes in response to declining volume and operational needs, "as well as shifting mailer preferences and expectations regarding the

processing of their mail, sound policy and the law militate decisively in favor of further exploration on the record.” *Id.*

The general reopening of the record advocated by the Postal Service has the potential for permitting the unnecessary relitigation of issues previously decided by Order No. 718. In that Order, the Commission found: (1) GameFly and Netflix are similarly situated; (2) the Postal Service has been discriminating against GameFly and in favor of Netflix; and (3) the discrimination against GameFly and in favor of Netflix was undue and in violation of 39 U.S.C. § 403(c). As a matter of *res judicata*, or issue preclusion, relitigation of those issues is not appropriate and will not be permitted.<sup>17</sup> The Postal Service’s assertion that it has never accepted the validity of these findings and conclusions is irrelevant. See March 14 Postal Service Reply at 3. The Postal Service voluntarily elected not to appeal Order No. 718 and the Court’s *GameFly* opinion left those findings and conclusions undisturbed. The *GameFly* opinion is final. Order No. 718’s findings and conclusions left undisturbed by the Court are final. Without adequate justification, a general reopening of the record to revisit issues previously decided would result in unnecessary delay and harm to GameFly.

Reopening of the record would be appropriate only to consider specific factual issues essential to developing a satisfactory remedy. The record need not be reopened to explore irrelevant issues or issues related to what appear to be ineffective or unworkable remedies. Remand proceedings must be concluded expeditiously giving

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<sup>17</sup> See *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”); see also *Nasem v. Brown*, 595 F.2d 801, 806 (D.C. Cir. 1979) (“The proposition that administrative proceedings may collaterally estop relitigation in courts is by now well established.”). In vacating Order No. 718 and remanding to the Commission, the Court was clear that it was not rejecting the Commission’s finding of undue discrimination (“When, as in this case, the Commission properly finds that discrimination has occurred...”) and that the sole purpose of the remand was to impose an appropriate remedy (“Therefore, we must vacate the Commission’s order and remand this case for an adequate remedy.”). 704 F.3d at 149.

fair consideration to credible potential remedies, with reopening of the record only undertaken as necessary to adopt an appropriate remedy.

In the two sections that follow, the Commission assesses each proposed remedy for its effectiveness, enforceability, and risk of unnecessarily delaying relief. It focuses first on operational remedies and then turns to rate-based remedies.

## B. Operational Remedies

To be adopted by the Commission, an operational remedy must, for the reasons discussed above, be effective, enforceable, and must not unnecessarily delay relief to GameFly. Only three of the proposed operational remedies are likely to be effective in remedying or explaining discrimination. None of the proposed operational remedies is likely to be enforceable. Additionally, all of the operational remedies are likely to result in undue delay.

### 1. Effectiveness

Of the six potential operational remedies identified by the Commission and the parties, three—the Postal Service Operational Remedy, Commission-Identified Operational Remedy No. 2, and Commission-Identified Operational Remedy No. 3—would continue to expose GameFly to a significant risk of DVD breakage by leaving the opportunity for service discrimination in place.

#### a. Postal Service Operational Remedy

The Postal Service Operational Remedy is likely to permit the terms of service discrimination identified by the Court to continue because of the vagueness of the standard for non-machine letter processing (*i.e.*, “[t]o the extent possible and practicable” and “to substantially the same degree” as other DVD mailers’ DVD mail). Letter at 1.

The Commission is not convinced that the Postal Service’s notion of “substantial parity” aligns with the Court’s and the Commission’s conception of a complete remedy. See *id.* at 1. The existing record demonstrates that the Postal Service viewed its past discriminatory treatment of GameFly as something approaching substantial parity with Netflix. In its initial brief, the Postal Service argued that it had not provided preferential treatment to Netflix or Blockbuster because it did not provide any sort of processing commitment to Netflix or Blockbuster.<sup>18</sup> The Commission rejected this view, focusing on the Postal Service’s actions rather than its assertions. The Commission found that “the differences in mail service between Netflix and Blockbuster, on the one hand, and GameFly on the other, are not due to a knowing and voluntary decision by GameFly to mail as flats, rather than letters[,]. . . [but, rather, to] . . . differences in the service offered by the Postal Service.” Order No. 718 at 68, ¶ 4137.

This proposed remedy offers no assurance that GameFly would enjoy the same treatment as Netflix under the Postal Service Operational Remedy. Instead, the Postal Service emphasizes the likelihood that local variations in processing will lead to different degrees of manual processing for different DVD mailers. If the Commission cannot reasonably expect that its remedy will provide GameFly and Netflix with equal degrees of manual processing, it has not addressed the Court’s concern with residual terms of service discrimination. As the Commission noted in its analysis of a similar remedy proposed by the Postal Service in the initial proceedings, “it was GameFly’s refusal to accept what it viewed [as] a far lower likelihood that its mail would receive hand processing that led GameFly to continue purchasing flats service.” *Id.* at 50, ¶ 4085. A remedy under which GameFly must continue to choose flats over letters because it expects that the Postal Service will treat its letters differently than the letters of other DVD mailers cannot be said to remedy the residual discrimination. Moreover, this operational remedy expressly omits any enforcement mechanism.

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<sup>18</sup> Initial Brief of the United States Postal Service, November 8, 2010, at 76.

b. Commission-Identified Operational Remedy No. 2

Under this remedy, GameFly would find itself in the same position it occupied when it initiated its complaint: paying the full second-ounce flat rate to send its DVDs as flats. It would have no assurance that the Postal Service would offer any degree of manual processing to GameFly if it mailed its DVDs as letters. Netflix would be subject to higher rates, since the Postal Service would be required to impose the non-machinable surcharge on all letter-shaped DVD mail that the Postal Service has observed breaking and jamming automated letter processing equipment.<sup>19</sup> Assuming the Postal Service continues its practice of not imposing the non-machinable surcharge to some letter-shaped DVD mail it has determined is non-machinable, other DVD mailers could also be subject to higher discriminatory rates. This remedy leaves open the possibility that the Postal Service could continue to provide manual processing only to Netflix (and not other letter-shaped DVD mailers) and still subject all letter-shaped DVDs to the non-machinable surcharge. May 13 GameFly Response at 7-8. GameFly argues convincingly that this remedy will only satisfy the Court's directive if it includes a "requirement of parity in manual processing between GameFly and Netflix DVDs entered as letters." *Id.* at 7.

c. Commission-Identified Operational Remedy No. 3

Commission-Identified Operational Remedy No. 3 would include a directive to manually process DVDs, but it would leave implementation almost entirely in the hands of local Postal Service managers. There would be some post hoc data collection and monitoring, which would presumably allow the Commission and GameFly to monitor the actual implementation of the directive. But the Postal Service advises the Commission and GameFly to expect significant variation in actual implementation, depending on local processing decisions. Because GameFly could expect under this remedy that

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<sup>19</sup> See *id.* at 66-67, ¶ 4136 (citing evidence that Netflix and Blockbuster return DVD mail broke and jammed automated letter processing equipment).

some (potentially large) portion of its DVDs would not be manually processed if they were sent as letter-shaped mail, this remedy does not give GameFly a meaningful choice between letter-shaped and flat-shaped mail that remedies the service discrimination.

d. The Remaining Three Operational Remedies

The remaining operational remedies—GameFly’s First Operational Remedy, GameFly’s Second Operational Remedy, and Commission-Identified Operational Remedy No. 1—could at least, in theory, be effective. As designed, each would be based upon an objective performance standard that would apply to all DVD mailers (GameFly’s First Operational Remedy—“a measurable and enforceable level of manual culling and processing of DVD mailers sent at machinable letter rates”; GameFly’s Second Operational Remedy—“the same level of manual processing to Netflix and GameFly” or discontinuance of manual processing of Netflix mail; and Commission-Identified Operation Remedy No. 1—a requirement that the Postal Service manually process all letter-shaped DVD mail and an enforcement mechanism to ensure manual processing at a certain level.

2. Enforceability

Every operational remedy proposed by the parties and identified by the Commission is likely to prove prohibitively difficult to enforce. The problem of identifying an enforceable remedy is not new. Order No. 718 expressed the Commission’s difficulties in identifying an enforceable operational remedy. Order No. 718 at 111-12, ¶¶ 5014-16.

It would be extremely difficult for the Commission and the Postal Service to carry out the kind of day-to-day, nationwide monitoring of the Postal Service’s extensive operational network that would allow the Commission to determine whether GameFly was receiving the same treatment as other DVD mailers. As the Postal Service emphasizes in its May 3 letter, even the new operational environment it alludes to would

still be subject to “substantial variations in conditions and operations experienced in the field,” making it “unrealistic” and “difficult, if not practically impossible, or exceedingly costly, to maintain an ongoing enforcement mechanism that would ensure that every mailer’s DVD letters will receive exactly the same levels of manual processing experienced by every other mailer of DVD letters, either locally or nationally.” May 3 Letter at 1, 2.

Nothing in the filings on remand indicates that the operational situation has changed in a way that would make monitoring or enforcement of the Postal Service’s treatment of DVD mailers more practical. The Postal Service continues to express its unwillingness to commit to meaningful monitoring or enforcement, and the cost of carrying out such monitoring and enforcement is certain to be high. Given the low probability that the operational changes cited by the Postal Service would result in an enforceable remedy, the Commission cannot justify the additional delay of reopening the record in the hopes of developing a satisfactory, enforceable operational remedy.

There is a strong possibility that the Postal Service may not be able to collect the data necessary to monitor compliance with an operational remedy. The Postal Service and the Commission proposed the use of Intelligent Mail barcodes (IMb) to monitor compliance, but as GameFly notes, the Postal Service and the Commission have found in the past that it may be difficult to use “information on the number of times mailpieces pass through *automated* processing equipment [to shed] light on the proportion of mailpieces processed *manually*.”<sup>20</sup> The degree of local variation cited by the Postal Service in its Notice would also be a barrier to effective enforcement. Effective enforcement would likely require geographically widespread and “day-to-day oversight of mail processing operations.” Order No. 718 at 111, ¶ 5014. GameFly envisions an “objective national standard” paired with “effective mechanisms for measuring actual

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<sup>20</sup> May 13 GameFly Response at 14 (quoting Brief for Respondent Postal Regulatory Commission, No. 11-1179 (D.C. Cir. Feb. 17, 2012) at 36 (emphasis in original)); see *also id.* at 13-14 (quoting Brief of the United States Postal Service, No. 11-1179 (D.C. Cir. March 5, 2012) at 13).

performance and enforcing compliance with the standard,” but acknowledges that the record “shows that no realistic means of achieving effective enforcement exists.” May 13 GameFly Response at 10, 11.

Even if an effective type and degree of monitoring is possible, it may not be desirable. The necessary monitoring would impose significant costs on the Postal Service. As the Postal Service explained, effective enforcement of equality in avoidance of machine processing under the Postal Service Operational Remedy “would be difficult, if not practically impossible, or exceedingly costly.” Letter at 2. The Commission continues to hold that it is unable “to develop modifications to protect against the imposition of potentially large costs on the Postal Service, mailers, and the Commission itself.” Order No. 718 at 112, ¶ 5016. The Commission is particularly reluctant to impose this burden on the Postal Service when a more complete and efficient rate-based remedy exists.

The Postal Service also objects that an operational remedy would require an unnecessary intrusion into the Postal Service’s discretion. *See id.* The Postal Service asserts that imposing an operational remedy would allow future complainants in discrimination cases to seriously limit the Postal Service’s operational discretion. The Commission notes that neither GameFly nor the Court appears to be overly concerned with the method the Postal Service uses to process its mail, as long as the process does not result in more GameFly letter mail being subject to automated processing and the concomitant risk of breakage. However, because the terms of service discrimination in this case can be remedied more completely and effectively by a rate adjustment, the



Commission need not address the effect of remedies in complaint cases on the scope of the Postal Service’s operational discretion at this time. See *id.* at 111, ¶ 5014.<sup>21</sup>

All of the remedies identified by the Commission and the parties present difficulties with enforcement. Perhaps this is the reason GameFly has shifted its emphasis from an operational remedy to a rate-based remedy.<sup>22</sup>

### 3. Risk of Unnecessary Delay

GameFly contends that the record in this docket creates a “heavy presumption” against an operational remedy. *Id.* at 15-16. GameFly and the Postal Service agree that selection of any of the operational remedies identified above would require a reopening of the record. GameFly asserts that any operational remedy would require “more elaborate fact-finding,” especially since the Postal Service argued against an operational remedy in earlier proceedings. March 18 GameFly Response at 9 (“A proposed *operational* remedy may very well require more elaborate fact-finding and perhaps even discovery.” (Emphasis in original)).

The Postal Service expresses concerns with the adequacy of the record, primarily because it believes that the existing record does not reflect changes in the processing of DVD mail and “major parts of the operating environment.” March 14 Postal Service Reply at 9; see *also* May 6 Postal Service Notice at 2 (“In the event the Commission determines to impose a remedy other than its original remedy, or one

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<sup>21</sup> The Postal Service is entitled to discretion in its operational processes only insofar as it does not use that discretion to discriminate unduly against mailers. In this case, the record has demonstrated that the Postal Service has consistently used its “statutory authority to direct postal operations” to favor a particular mailer and refused to extend that favorable treatment to another similarly situated mailer. Although an operational remedy is not the most effective way to remedy fully the discrimination in this case, the Commission is not prepared to rule out the possibility of an operational remedy in a future complaint case if the record calls for such a remedy.

<sup>22</sup> See, e.g., March 7 GameFly Motion at 11 (advocating that the Commission impose a rate-based remedy as the “next best alternative” to an operational remedy) and 15-16 (citing Postal Service claims and Commission findings in Order No. 718 regarding the difficulties and potential costs of an operational remedy).

*identical* to the offer in the Postal Service’s May 3, 2013 letter [*i.e.*, the Postal Service Operational Remedy identified in Order No. 1700], the Postal Service reiterates its position that the Commission must reopen the record to develop sufficient support for such a remedy.” (Emphasis added.))

The Commission must consider the potential for harm to GameFly and other mailers that could result from the additional time needed to reopen the record and explore the feasibility and appropriateness of an operational remedy. GameFly asserts that “continued delay in prescribing relief is costing the company about \$470,000 per month, or \$5.6 million per year” and notes that the Commission is prevented by 39 U.S.C. § 3681 from ordering any refund of postage paid by GameFly. May 13 GameFly Response at 2. If correct, these amounts are significant. Further, a delay in reaching a decision in this case creates uncertainty for other DVD mailers, regardless of whether they mail flats or letters.

Given the Postal Service’s assertions that the record does not reflect recent operational changes; given the likelihood that, by definition, operational changes could affect the formulation of an operational remedy; given GameFly’s position that the existing record is inadequate to support an operational remedy; given the inherent difficulties in creating an enforceable operational remedy; given the apparent likelihood of potentially prolonged proceedings needed to develop an adequate record to support an operational remedy; and given the further injury that GameFly will endure from potentially protracted remand proceedings, the Commission declines to reopen the record in this docket to impose an operational remedy.

*Conclusion.* For the reasons discussed above, the Commission concludes that the potential operational remedies identified by GameFly, the Postal Service, and the Commission will not provide an effective, enforceable, and timely remedy.

### C. Rate-Based Remedies

Rate-based remedies, like operational remedies must be effective, enforceable, and not unnecessarily delay relief to GameFly. Only one of the proposed rate-based remedies effectively remedies or explains any residual discrimination. All of the rate-based remedies are enforceable, but only one avoids the risk of undue delay.

#### 1. Effectiveness

The three potential rate-based remedies identified by GameFly, the Postal Service, and the Commission are: GameFly's Equal Contribution Remedy, Order No. 718's Rate-Based Remedy, and GameFly's Equalized Rate Remedy. The first two of these rate-based remedies are unlikely to remedy or explain the service-based discrimination identified by the Court. The last potential remedy—GameFly's Equalized Rate Remedy (or a variant)—provides a legally sound and effective remedy.

##### a. GameFly's Equal Contribution Remedy

An equal contribution remedy was originally proposed by GameFly and was rejected by the Commission in Order No. 718 because the record lacked adequate cost information to develop such a remedy. Order No. 718 at 112, ¶ 5019. On remand, the Postal Service takes the position that the record needs to be reopened in order to obtain additional cost information needed to explore the appropriateness of the equal contribution remedy. March 14 Postal Service Reply at 18. GameFly, by contrast, seeks to abandon its previously proposed equal contribution remedy, arguing that such remedy does not go far enough because it fails to eliminate all discrimination as mandated by the Court. May 13 GameFly Response at 5-7.

In its opinion, the Court stated its expectation that on remand, “the Commission will surely consider those remedies [*i.e.*, the remedies previously proposed by GameFly], but there may be a range of other possible remedies which would withstand appellate review.” 704 F.3d at 149. Presented with an opportunity to obtain an even more favorable remedial rate in light of other passages in the Court's opinion, GameFly

now seeks to withdraw its proposed equal contribution remedy. This attempted withdrawal of the equal contribution remedy does not, however, bind the Commission, since, as the Court pointed out, it is the Commission that is obligated to remedy the undue discrimination found by Order No. 718 to exist. *Id.* With that obligation comes the right to reconsider the appropriateness of the equal contribution remedy unless other reasons are present for no longer considering that remedy.

The Commission concludes that further consideration of the equal contribution remedy is not appropriate. GameFly acknowledged at the time it proposed the equal contribution remedy that it would produce different rates for one-ounce letter-shaped and two-ounce flat-shaped DVD mail. Order No. 718 at 112, ¶ 5018. In other words, the rate discrimination found by Order No. 718 to exist would not be completely eliminated. That being the case, a satisfactory explanation would be required to demonstrate that “any [such] residual discrimination is due or reasonable under § 403.” 704 F.3d at 149.

In the analogous situation presented by the remedy adopted in Order No. 718, the Commission attempted to justify the residual discrimination left in place by relying upon “cost differences and ... general pricing differences...[to conclude that]...the remaining rate disparity is reasonable in light of the differences between letter-shaped and flat-shaped round-trip DVD mailers.” Order No. 718 at 115, ¶¶ 5029, 5030. The Court’s rejection of the Commission’s justification for the residual discrimination left in place by Order No. 718 applies with equal force to GameFly’s Equal Contribution Remedy. Beyond the justification it offered in Order No. 718, the Commission is aware of no further justification for the remaining discrimination that would be left in place by GameFly’s Equal Contribution Remedy. Nor has the Postal Service offered any further possible explanation. Accordingly, the Commission rejects the equal contribution rate remedy previously proposed by GameFly.

b. Order No. 718's Rate-Based Remedy

The Postal Service urges the Commission to reconsider the remedy it originally adopted in Order No. 718 and reopen the record to gather further evidentiary support. May 14 Postal Service Response at 8. GameFly opposes that suggestion and argues that the Postal Service's position is based upon a misreading of the Court's opinion. March 18 GameFly Response at 7-8.

In the Postal Service's view, the "residual discrimination" that the Court concluded had been inadequately explained by the Commission was the operational discrimination that Order No. 718's remedy had left in place, not any residual discrimination with respect to the rates paid by GameFly and Netflix. March 14 Postal Service Reply at 11. Based upon this interpretation of the Court's opinion, the Postal Service argues that "the Court's opinion does not restrict the Commission's ability to explain the rate differences in its original remedy based on GameFly's use of flats processing and other DVD mailers' use of letter processing; it addresses only the Commission's justification of a remedy that retains different operational treatment in the form of manual processing for Netflix but not GameFly." *Id.* Proceeding from this premise, the Postal Service argues that the Commission should rely upon evidence already in the record "to conclude that the original remedy's allowance of manual culling for Netflix but not GameFly is based, not on GameFly's decision to mail its DVDs as flats, but on practical operations choices through local decisions that are dictated by characteristics such as Netflix' mail's volume and density and distinctive mail piece color." *Id.* at 11-12. Once these operational matters are addressed, the Commission should, in the Postal Service's view, reopen the record to develop support for the DVD letter and DVD flats rates that were established by the original remedy. *Id.* at 13.

There are three fundamental problems with the Postal Service's position. First, as GameFly correctly points out, the "residual discrimination" discussed by the Court in its opinion encompasses both operational and rate discrimination. March 18 GameFly

Response at 7-8.<sup>23</sup> Second, with respect to operational discrimination, the Postal Service's suggestion that the continued manual processing of Netflix, but not GameFly, mail can be explained by local operational decisions that are based upon differences in mail volume, mail density, and mail piece color, is an invitation to relitigate the Commission's findings in Order No. 718 that these differences did not justify discrimination in the processing of Netflix and GameFly mail. As discussed earlier, those findings are final and the Postal Service will not be permitted to relitigate the operational discrimination issue. Third, the Court has already rejected the Commission's attempt to rely upon cost and pricing differences between letter- and flat-shaped mail that the Postal Service now seeks to use to justify the different rates for DVD letter mail and DVD flats mail established by the original remedy. The Postal Service has offered no additional explanation which, in light of the Court's opinion, would adequately explain the residual discrimination left in place by Order No. 718's remedy. Nor does the Commission have an additional explanation beyond what it previously offered in Order No. 718 which the Commission believes would be adequate to satisfy the requirements of the *GameFly* opinion.

c. GameFly's Equalized Rate Remedy

In its motion to establish remand standards and procedures, GameFly urges the Commission to order the Postal Service either:

- (1) to reduce the First-Class price for a two-ounce flat-shaped round-trip DVD mailer to the current First-Class price for a one-ounce letter-shaped round-trip DVD mailer; or
- (2) to propose and document an alternative equalized rate that would fully eliminate the discrimination and comply with the other provisions of title 39, United States Code.

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<sup>23</sup> This interpretation is also consistent with the Commission's original findings in Order No. 718, that the undue discrimination against GameFly consisted of both operational and rate discrimination. Order No. 718 at 108, ¶ 5003.

March 7 GameFly Motion at 8. GameFly bases its position on the findings of Order No. 718, the Court's opinion, the Commission's statutory authority, and the need for immediate relief. *Id.* at 9-13.

The Postal Service opposes GameFly's suggested remedy by characterizing it as an attempt "to eliminate the Commission's discretion and remedial authority, and prevent it [the Commission] from opening the record or otherwise collecting input of guidance regarding the steps necessary to make an informed decision on remand." March 14 Postal Service Reply at 2.

The Postal Service alleges that the approval of GameFly's proposed remedy would "enshrine an unacceptable principle", *id.* at 3; states its opposition to the factual and legal basis of Order No. 718, *id.* at 3-4; suggests that GameFly's proposed remedy would be inconsistent with statutory and regulatory requirements, *id.* at 5-8; disputes GameFly's interpretation of the Court's opinion, *id.* at 8-10; asserts that unless the record is reopened, the GameFly remedy would lack adequate evidentiary support, *id.* at 10-14; and argues that GameFly is attempting to restrict consideration of remedies other than its preferred remedy in a manner that unnecessarily interferes with the Commission's remedial authority, *id.* at 14-15.

The Postal Service describes the "unacceptable principle" that it opposes as follows:

[t]hat any mailer who chooses to avail itself of the handling, processing, and cost incurrence associated with a particular category of mail or type of mail service is entitled to the lower rate available for a completely different category of mail, with different handling, processing and costs...[when]...[t]he eligibility for this rate treatment ...[rests]...on Postal Service decisions to treat the mailings of different mailers, with different physical characteristics and mailing patterns, differently, even if those differences are fully justified according to local decisions regarding costs and operational requirements and feasibility.

*Id.* at 3. There are at least two fundamental problems with this assertion. First, as Order No. 718 found and as the Court acknowledged, GameFly did not "choose" to mail

its DVDs as two-ounce flats. Order No. 718 at 67-68, ¶ 4137; *GameFly*, 704 F.3d at 149. GameFly was compelled to use two-ounce flats in order to avoid unacceptable levels of disc breakage. *Id.* Second, the decision to hand process Netflix letter mail, while refusing to provide GameFly with the same level of hand processing, was not due primarily to “local decisions”, but was heavily influenced by Postal Service Headquarters. *Id.* at 65-67, ¶¶ 4133-36. Clearly, the “unacceptable principle” opposed by the Postal Service is a serious mischaracterization and not a principle that GameFly is advocating.

Likewise, the Postal Service’s assertion that it has never conceded the correctness of the factual findings and legal analysis underlying Order No. 718’s determination of undue discrimination is irrelevant. The Postal Service chose not to appeal Order No. 718. The factual findings and legal analyses that the Postal Service now opposes were left undisturbed by the Court. Those aspects of Order No. 718 are now final and control the proceedings on remand.<sup>24</sup>

The Postal Service’s assertion that “a new rate, classification, or operational policy must be consistent with applicable laws and regulations” is true as a general matter; however, that assertion does not prevent adoption of a remedy that equalizes letter-shaped and flat-shaped round-trip DVD mail rates in response to a complaint found to be justified. In such circumstances, the Commission is authorized to “order the Postal Service [to] take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance....” 39 U.S.C. 3662(c). That authority includes the authority to take such action as “ordering unlawful rates to be adjusted to lawful levels...” *Id.* In Order No. 718, the Commission exercised that authority by directing the Postal Service, *inter alia*, to adjust its rates by offering a one-ounce rate for First-Class Mail round-trip flat-shaped DVD mailers that weigh up to two-ounces. Order No. 718 at 114-15, ¶ 5027.

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<sup>24</sup> See note 17, *supra*, and accompanying text.



The Commission's decision in Order No. 718 not to lower the rate for two-ounce flat-shaped DVD mail further was expressly based upon considerations of cost differences and general pricing differences between the First-Class Mail flat and letter products. *Id.* at 115, ¶ 5029. Those cost differences and general pricing differences are differences recognized by the statutory and regulatory requirements that the Postal Service now relies upon to oppose GameFly's proposed remedy. Notwithstanding these statutory and regulatory requirements, the Court has ruled that, on the facts presented in this case, these differences cannot be relied upon to preclude complete relief from the undue discrimination the Commission has found to exist. See 704 F.3d at 148-49. In light of the Court's ruling, the Postal Service must identify a more persuasive bar to the adoption of an equalized rate remedy. It has failed to do so.

Finally, the Commission finds unpersuasive the Postal Service's claim that GameFly seeks unnecessarily to interfere with the Commission's remedial jurisdiction by proposing "a number of restrictions that would apply to any alternative remedy submitted by a party other than GameFly, and that would exclude from their scope only GameFly's preferred remedy." March 14 Postal Service Reply at 14-15. As GameFly argues in its reply to the Postal Service, the restrictions to which the Postal Service objects are not substantive restrictions on alternative remedies, but showings and information that GameFly asserts would be needed to justify such alternative remedies. March 18 GameFly Response at 9-10. The Commission agrees with GameFly's characterization of its demands for supporting information and does not interpret those demands as an infringement of the Commission's jurisdiction to consider and adopt an appropriate remedy.

Of the three rate-based remedies discussed above, two of those remedies—GameFly's Equal Contribution Remedy and Order No. 718's Rate-Based Remedy—would leave in place residual discrimination that the Commission cannot adequately justify, particularly in view of the availability of the more effective equalized rate remedy.

For the reasons discussed above, the Commission finds that neither an equal contribution remedy nor the rate remedy adopted by Order No. 718 is adequate to remedy the undue discrimination that was found in Order No. 718, but that equalized rates for letter-shaped and flat-shaped DVD mail will adequately remedy such discrimination.

## 2. Enforceability

All three potential rate-based remedies are enforceable. None of the three alternatives presents the complexities and difficulties associated with operational remedies. None of the three alternatives interfere with the Postal Service's operational prerogatives. Once established, enforcement of the rate-based remedies consists of simply charging the applicable letter or flats rate.

## 3. Risk of Unnecessary Delay

Contrary to the Postal Service's assertions, the Court's opinion does not bar the adoption of an equalized rate remedy without first conducting further administrative hearings to investigate each and every possible remedy. To support its assertions, the Postal Service cites the following passage from the Court's opinion:

We need not, and do not, address GameFly's argument that its proposed remedies should have been adopted by the Commission. Upon rehearing, the Commission will surely consider those remedies, but there may be a range of other possible remedies which would withstand appellate review.

March 14 Postal Service Reply at 9 (footnote omitted) (citing *GameFly*, 704 F.3d at 149). The Postal Service infers from this passage that "[t]o properly craft a new remedy, it is inevitable that the Commission would have to make certain factual inquiries." *Id.* The cited passage is not, however, broad enough to establish the inevitability of the factual inquiries demanded by the Postal Service. On the contrary, the quoted language states only the Court's expectation that the Commission will "consider" a range of other remedies, including the remedies previously proposed by

GameFly. It is exactly that task that the Commission has undertaken on remand, by, for example, identifying possible remedies in Order No. 1700 and inviting the parties to propose additional remedies they deem potentially worthy. The consideration of the remedies that have been identified does not require evidentiary hearings to explore factual issues presented by those remedies. This is especially true with regard to remedies that are determined to be impractical (*e.g.*, the operational remedies discussed in section III.B., *supra*); or that leave residual discrimination in place without any apparent explanation that would justify such residual discrimination (*e.g.*, the equal contribution remedy and the original remedy adopted by Order No. 718 and rejected by the Court in *GameFly*).

The Postal Service has not identified any material issues, factual or otherwise, which require a reopening of the record before an equalized rate for DVD letter and flats mail can be selected as a remedy for the undue discrimination found to exist in this case. The factual issues alleged by the Postal Service to require hearings (*e.g.*, mail volumes and mail densities) have either been addressed by Order No. 718 or have not been demonstrated by the Postal Service to be relevant bases for permitting any residual discrimination to continue in selecting an appropriate remedy.

Reopening the record to gather additional evidence in an effort to remedy flaws in GameFly's Equal Contribution Remedy or the Order No. 718 Rate-Based Remedy would therefore result in unnecessary delay in the implementation of an appropriate remedy. Such delay would produce further, unnecessary injury to GameFly. By contrast, an equalized rate remedy would be both effective and enforceable.

The Commission notes that the United States Court of Appeals for the District of Columbia Circuit has recognized the "usual rule that a reviewing court should leave the agency free on remand to determine whether supplemental fact-gathering is

necessary.”<sup>25</sup> A remand for further explanation of an agency decision does not require an agency to begin its administrative process entirely anew. *Sierra Club*, 325 F.3d at 382 (“The decision being at best inadequately explained, we remand for further explanation, though not necessarily for further notice-and-comment rulemaking.”). Rather, an agency has discretion “to take whatever course will ensure a record adequate for a fair and comprehensive determination of the issues.”<sup>26</sup>

*Conclusion.* For the reasons discussed above, the Commission concludes that an equalized rate remedy will be effective, enforceable, and can be implemented without unnecessary delay.

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<sup>25</sup> *Sierra Club, et al. v. Environmental Protection Agency*, 325 F.3d 374, 382 (D.C. Cir. 2003), quoting *National Grain & Feed Association, Inc. v. Occupational Safety and Health Administration*, 903 F.2d 308, 310-11 (5th Cir. 1990). See also *Chamber of Commerce of U.S. v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (“Where the court does not require additional fact gathering on remand...the agency is typically authorized to determine, in its discretion whether such fact gathering is needed...and how it should be accomplished.” (Internal quotations and citations omitted)).

These decisions rest on principles first explained by Justice Frankfurter in the seminal case of *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). In that case, on remand from an appeal to the D.C. Circuit, the FCC scheduled the appellant’s license application for argument along with the applications of two rivals. The Court found that, administrative agencies “should be free to fashion their own rules of procedures and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” *Id.* at 143. Justice Frankfurter explained, “On review the court may ... correct errors of law and on remand the Commission is bound to act upon the correction. But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.” (Internal citations omitted).

<sup>26</sup> *National Grain*, 903 F.2d at 311. In *National Grain*, the Fifth Circuit called the two-year gap between the closing of the record and an OSHA decision “inevitable, though regrettable,” and, five years after the record closed, declined to require OSHA to reopen the record. *Id.*

#### IV. SELECTION OF AN EQUALIZED RATE REMEDY

The Commission concludes that of the potential remedies presented by the parties or identified by the Commission, an equalized rate remedy will best allow it to carry out all its responsibilities on remand. All other remedies are unenforceable, likely to leave unjustified discrimination in place, or both. An equalized rate remedy would be enforceable and it would remedy both rate-based and terms of service discrimination.

Having concluded that an equalized rate remedy is appropriate, the question remains regarding what the equalized rate should be. In its March 7 motion, filed on remand, GameFly recognizes the possibility that “the Postal Service, rather than equalize rates for letter- and flat-shaped DVDs at [the] current one-ounce letter rate, may prefer to equalize the rates for letter-shaped and flat-shaped DVD mailers at a slightly higher level.” March 7 GameFly Motion at 14. Although it is amenable to the Postal Service’s filing of such a proposal, GameFly submits that certain minimal documentation should be required simultaneously and that GameFly should be given 30 days to review and comment on any such filing. *Id.* at 14-15.<sup>27</sup> If the Postal Service fails to file an alternative equalized rate proposal, GameFly believes the Commission should order the Postal Service to reduce the First-Class price for a two-ounce flat-shaped round-trip DVD mailer to the First-Class price for a one-ounce letter-shaped round-trip DVD mailer. *Id.* at 14.

The Commission agrees that it is appropriate to provide the Postal Service with an opportunity to design equalized rates for letter-shaped and flat-shaped DVD mailers before imposing an equalized rate based upon the current First-Class letter rate. In light of the fact that GameFly has been accorded only partial relief from the undue discrimination it has endured, and the further fact that such partial relief did not become

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<sup>27</sup> The supporting documentation would consist of (1) a general description of the alternative rate remedy and an explanation of how it complies with the Court’s Opinion; (2) the proposed rate schedule(s), with relevant Mail Classification Schedule and Domestic Mail Manual language; and (3) price cap calculations (if necessary) or an explanation of why they are unnecessary. *Id.* at 14.

available until after the Commission issued Order No. 718 on April 11, 2011, the Commission believes it is appropriate to require the filing of an alternative Postal Service equalized rate proposal within the 30 days proposed by GameFly. Such a filing should be accompanied by the information GameFly has identified in its March 7 GameFly Motion at 14. If the Postal Service makes such a filing, the Commission will issue a public notice and give interested parties 20 days to review and comment on the proposal.

Any equalized rate proposal shall provide mailers of both letter-shaped and flat-shaped DVD mailpieces the opportunity to qualify for workshare discounts on the outbound leg.<sup>28</sup> The return leg, by its nature, does not lend itself to worksharing. The same opportunity to qualify for presort discounts was provided to both letter-shaped and flat-shaped DVD mailers by Order No. 718. Order No. 718 at 114-115, ¶¶ 5026-5027. In addition, letter-shaped DVD mailers shall not be subject to the non-machinable surcharge. This same limitation was imposed by Order No. 718. *Id.* at 114, ¶ 5026. It ensures that other mailers of letter-shaped DVD mailpieces will receive the same treatment as Netflix, whose mail was not subjected to the non-machinable surcharge. See *id.* at 92, ¶ 4209.<sup>29</sup>

Should the Postal Service elect not to file its own equalized rate proposal, it shall file a reduction in the price for a First-Class two-ounce flat-shaped round-trip DVD

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<sup>28</sup> That is, 5-digit automation flats qualify for 5-digit automation letter rates, 3-digit automation flats qualify for 3-digit automation letter rates, and ADC automation flats qualify for AADC automation letter rates.

<sup>29</sup> Implicit in the Commission's limitation on the imposition of the non-machinable surcharge on the letter-shaped DVD mailpieces of other DVD mailers is the Commission's rejection of the Postal Service's assertion that it is not necessary for the Commission in this proceeding to address pricing and processing issues of all DVD mailers. May 17 Postal Service Reply at 13-14. The Postal Service's proposed limitation on the remedy adopted in this proceeding is based upon its generalized and otherwise unexplained and undocumented assertions that other mailers of letter-shaped DVD mailpieces "have adapted their business models to Postal Service operational policies, and developed packaging and mailing practices that are compatible with processing on automated letter machines." *Id.* at 13. Acceptance of the Postal Service's argument would also continue the opportunity for residual discrimination without reasonable explanation in violation of the Court's admonition. See 704 F.3d at 149.

mailer to the price for a First-Class one-ounce letter-shaped round-trip DVD mailer. In that event, the MCS language for First-Class flat-shaped round-trip DVD mailers previously established in Order No. 718, Appendix B at 1-2, will be revised as set forth in Appendix A to this Order.<sup>30</sup>

Regardless of what equalized rates the Postal Service decides to implement, the implementation date for the rate adjustments and MCS language changes shall be not less than 45 days or more than 65 days from the date it submits the equalized rates to the Commission. This 20-day period will allow the Postal Service to choose a convenient date for implementation while providing GameFly with appropriately prompt relief.

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<sup>30</sup> In the event the equalized rate for letter-shaped and flat-shaped DVD mailers is based upon the letter-shaped rate, it will not be necessary to revise the MCS language adopted by Order No. 718 for First-Class letter-shaped round-trip DVD mailers.

## V. ORDERING PARAGRAPHS

*It is ordered:*

1. The Postal Service shall equalize the rates for letter- and flat-shaped DVD mail either by: (1) establishing new equalized rates for letter-shaped and flat-shaped DVD mail; or (2) reducing the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer.
2. The Postal Service may establish new equalized rates for letter-shaped and flat-shaped DVD mail by filing with the Commission a notice of price adjustment within 30 days of the date of issuance of this Order. Such notice of price adjustment shall include the following: proposed rate schedules; an explanation of the new equalized rates; any necessary price cap calculations (or an explanation of why such calculations are unnecessary); proposed appropriate Mail Classification Schedule language; and an effective date not less than 45 days or more than 65 days after the date of the notice of price adjustment.
3. If the Postal Service elects not to propose new equalized rates for letter-shaped and flat-shaped DVD mail, the Postal Service shall file with the Commission a notice of such election and of price adjustment within 30 days of the date of issuance of this Order. In such event, the Postal Service shall reduce the price for a two-ounce First-Class flat-shaped round-trip DVD mailer to the price for a one-ounce First-Class letter-shaped round-trip DVD mailer, effective not less than 45 days or more than 65 days after the date of the notice of election. The Mail Classification Schedule language applicable to two-ounce First-Class flat-shaped round-trip DVD mailers shall be revised as provided in Appendix A hereto.



4. All pending motions not otherwise acted upon in this Order are hereby denied.

By the Commission.

Shoshana M. Grove  
Secretary

Appendix

**Mail Classification Schedule Language**

**1115 Flats**

\* \* \* \* \*

**1115.5 Prices**

\* \* \* \* \*

*Flat Round-Trip Mailer*

- a. Flat Round-Trip Mailer service allows a mailer to send a flat-shaped mailpiece to a subscriber at the applicable one (1) ounce ~~Flats~~machinable Letter price and pay postage for the return of the contents of that mailpiece at the one (1) ounce Single-Piece ~~Flats~~ Machinable-Letter price.
- b. A mailer may either prepay postage for the return mailpiece by using Permit Reply Mail or only pay for mailpieces actually returned by using Business Reply Mail.
- c. Qualifying pieces must contain a standard 12 cm or smaller optical disc.
- d. Pieces weighing no more than two (2) ounces qualify for the one (1) ounce rate.
- e. Returned pieces must be picked up by the mailer at designated Postal Service facilities.

- f. Flat Round-Trip Mailers are not subject to prices for:
  - (i) the Nonmachinable Letters price category of Presorted Letters/Postcards, or
  - (ii) the Single-Piece Nonmachinable Letters price category of Single-Piece Letters/Postcards.